STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2011
v	No. 296810 Oakland Circuit Court
RONALD ALLEN MITCHELL, Defendant-Appellant.	LC No. 2009-226992-FC

Before: GLEICHER, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13). Defendant was sentenced to 9 to 40 years' imprisonment for each count. Defendant appeals as of right. We affirm.

The victim in this case testified that she was sexually abused by defendant, her mother's boyfriend, from the ages of 8 to 11, and that the abuse included vaginal, oral, and anal sex. When the victim was approximately 19 years old, she informed her grandmother about the allegations, and the victim reported the allegations to the police in 2007 and provided at least one written statement. The victim did not explicitly refer to vaginal intercourse in her written statement, but the victim's grandmother was permitted to testify over the defense's objection that the victim previously told her that the abuse included vaginal intercourse.

We review preserved claims of evidentiary error for an abuse of discretion and reversal is only warranted if, after reviewing the entire record, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999). Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Prior consistent statements are not generally admissible as substantive evidence." *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987). The trial court admitted the grandmother's testimony pursuant to MRE 801(d)(1)(B), which provides that prior consistent statements are not hearsay if the "declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement," and the statement is "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." MRE 801(d)(1)(B).

In determining whether a prior consistent statement is admissible under MRE 801(d)(1)(B), this Court has looked to persuasive federal case law construing FRE 801(d)(1)(B). *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). The *Jones* Court determined there are four requirements for admissibility of a prior consistent statement:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*Id*. (citations omitted).]

Defendant asserts that his defense at trial was that the victim's motive to fabricate existed before making the statement at issue. Specifically, the victim desired to manipulate a custody dispute between defendant and the victim's mother over the victim's half-sister to prevent defendant from gaining custody. Defendant asserts that this motive arose before the victim made any statements to her grandmother. On the other hand, the prosecution argues that the defense "was implicitly alleging that [the victim] had fabricated the allegations of vaginal intercourse after she initially spoke to the police because she had not included the accusations in her written report to the police."

Defendant's argument that the victim's veracity was never challenged with an implication of *recent* fabrication has no merit. While the motive to influence the custody case may have existed before the victim went to the police, the specific nature of the penetrations was not relevant to support the argument related to that motive. Regardless whether the victim alleged that defendant penetrated the victim orally, anally, or vaginally, defendant could argue that the allegations were fabricated to sway the custody dispute. Defendant was initially charged with one count of oral sex, one count of vaginal sex, and two counts of anal sex, and all of the charges were brought after the victim's statements to police. At trial, defendant challenged the victim's claims of vaginal penetration based on the absence of such allegations in the victim's statements to the police. Thus, there was, by implication, a claim of recent fabrication as to the specific claim of vaginal penetration. To the extent defendant argues otherwise, he has not demonstrated plain error requiring reversal.

Related to the implied claim that the victim's motive to fabricate claims of vaginal penetration arose after she reported the allegations to the police because she did not explicitly refer to vaginal intercourse initially, we note that both the victim and her grandmother were subject to cross-examination at trial. Also, the victim's alleged statement to her grandmother was elicited to rebut an implied charge that the victim fabricated her in-court testimony regarding vaginal intercourse because she did not explicitly set forth such allegations in her written statement. The victim made the statement to her grandmother before she made any statements to police. See *Jones*, 240 Mich App at 707. Therefore, under this scenario, the grandmother's testimony regarding what the victim told her was properly admitted under MRE 801(d)(1)(B).

Even if the only charge of fabrication in this case were related to defendant's claim that the allegations were fabricated to influence the custody case, it is not clear whether the victim's statement to her grandmother was made before this motive to fabricate arose. Given the uncertainty as to when the custody proceedings concluded, we do not find that the trial court

abused its discretion in admitting the testimony. Even if the trial court erred in admitting the testimony, however, the error was harmless. Because on review of the entire record, it does not affirmatively appear that it is more probable than not that the alleged error was outcome determinative, reversal is not warranted. *Lukity*, 460 Mich at 495-496; *People v McCray*, 245 Mich App 631, 641-643; 630 NW2d 633 (2001). The victim had already testified that the sexual abuse included vaginal sex, and she testified her statements to the police that defendant "made [her] have sex with him" and engaged in "different sex positions"—meant "vaginal sex." Thus, the grandmother's testimony was cumulative of evidence already before the jury, and defendant was not prejudiced by the admission of the evidence. See *People v Rodriquez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). There was no error requiring reversal.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Jane E. Markey